No. 57042-4-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THREE TREE ROOFING COMPANY,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Washington Industrial Safety & Health Act (WISHA) protects workers from unsafe and unhealthful working conditions. An employer may be subject to inspection and citation for a violation of any safety or health standard. However, no citation may be issued if the violation was the result of unpreventable employee misconduct. Furthermore, a serious violation cannot be upheld where the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The existence of unpreventable employee misconduct is an affirmative defense available to employers when the four elements are established: 1) a thorough safety program, including work rules, training, and equipment designed to prevent the violation; 2) adequate communication of these rules to employees; 3) steps to discovery and correct violations of its safety rules; and 4) effective enforcement of its safety program as written in practice and not just in theory.

II. STATEMENT OF THE CASE

A. Procedural Posture

Three Tree Roofing was the subject of an inspection at 975 Rose Pl. in Buckley, Washington on September 10, 2019, conducted by the Department of Labor & Industries (the "Department") that resulted in a citation.[1] The inspection was completed by Jessica Wilke, a Department Compliance Safety & Health Officer ("CSHO").[2] On the date of the inspection, CSHO Wilke observed employees of Three Tree Roofing working on the roof of a two-story residence.[3]

After gaining consent to enter, CSHO initiated a formal safety inspection and conducted an opening conference that day with crew leader Misael Sanchez, which she estimated lasted about 5-10 minutes.[4] She also spoke with the company owner, Neil Haugen via phone shortly after to take an initial statement

[1] Clerks Papers (CP) at 335.
[2] CP at 315.
[3] CP at 316-317.
[4] CP at 150-151.

and again later that day to perform a closing conference, at which time she disclosed the identified hazards that were anticipated to lead to a citation.[5] CSHO Wilke utilized an interpreter to speak with some of the employees on site who were Spanish-speaking only.[6]

Following the inspection, a citation was issued October 25, 2019, for two alleged violations:

- Item 1-1 was designated a Repeat Serious violation of WAC 296-155-24609(7)(a) with assessed penalty of $15,000;
- Item 2-1 was designated a Serious violation of WAC 296-876-40030(1) with assessed penalty of $1,000. [7]

Three Tree Roofing appealed the citation and a Corrective Notice of Redetermination ("CNR") was issued February 24, 2020, that affirmed the violations, but reduced the penalties regarding Item 1-1 from $15,000 to $10,500.[8] Three Tree Roofing appealed the CNR to the Board, which was assigned Docket No. 20 W1011.[9] An evidentiary hearing was

[5] CP at 151, 173.
[6] CP at 179.
[7] CP at 341.
[8] *Id.*
[9] CP at 80.

heard remotely on March 29, 2021.[10] A Proposed Decision & Order ("PD&O") was issued July 21, 2021, that affirmed the CNR without any modifications.[11]

The PD&O properly outlined the issues on appeal, notably that Three Tree Roofing challenged liability for the fall protection violation due to unpreventable employee misconduct.[12] The reviewing judge held that the affirmative defense did not apply because Three Tree Roofing failed to establish its safety program was effective in practice.[13] According to the reviewing judge, evidence established that the company had a safety plan, trained and re-trained its employees, and took adequate steps to discover and correct safety violations – taking issue only with the effectiveness of the safety program in practice.[14]

Three Tree Roofing petitioned the Board for Review, which was denied September 16, 2021, effectively adopting the

[10] CP at 128.
[11] CP at 24.
[12] *Id.*
[13] CP at 27.
[14] *Id.*

PD&O as the final decision of the Board.[15] Further appeal was taken at Pierce County Superior Court where the Board decision was reversed as to violation item 1-1, finding that Three Tree Roofing had established the affirmative defense of unpreventable employee misconduct.[16] The Department appealed to this Court.[17]

B. Relevant Facts

1. The Department failed to consider evidence that Three Tree Company Consistently Enforced its Safety Program.

The Department supports its appeal largely by facts as stated by CSHO Wilke, which are based on her understanding of statements made and documents provided during the inspection process, as opposed to all evidence presented at the Board.[18] CSHO Wilke concluded the employer had failed to demonstrate the last two prongs of the unpreventable employee misconduct defense (taking steps to discover and correct safety

[15] CP at 9-17, 8.
[16] CP at 588.
[17] CP at 592.
[18] *See e.g.* Appellant's Brief at 8, 10, 14, 15; CP at 150-151, 155, 173.

violations and effective enforcement of its safety plan).[19] The Board disagreed and only found the fourth element lacking.[20]

CSHO Wilke testified that Three Tree Roofing did not take steps to discover violations with the particular crew at issue, however when confronted with documentation to the contrary, she acknowledged the company was specifically monitoring them.[21] In fact, Three Tree Roofing took several actions to discipline and redirect this crew following an earlier incident in April 2019, including disciplinary action, reorientation and retraining of safety rules, specific meetings about the safety issues, and increased supervision.[22] Targeted site inspections were undertaken, documenting the "necessity of ALWAYS wearing harnesses."[23]

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[19] CP at 160-161, 186-188.
[20] CP at 27.
[21] CP at 195.
[22] CP at 275, 474, 484, 490, 492.
[23] CP at 275, 493 (emphasis in original).

CSHO Wilke testified that the company's discipline of its employees was only in response to Department inspections.[24] When confronted with records that showed the employer documented disciplinary action outside of a Department safety inspection, she indicated it would influence her assessment of the case.[25]

The company has a progressive safety disciplinary policy; beginning with a verbal warning, then a written warning, and possible termination for a third violation of any safety rule.[26] This policy was consistently enforced and not just in response to an unannounced safety inspection by the Department.[27]

The policy is not written as an absolute mandate applicable to every situation, rather it states the expectation of compliance among employees, the purpose of discipline,

[24] CP at 158.
[25] CP at 197.
[26] CP at 279.
[27] CP at 539.

prioritizing safety, and the scenarios in which application of the safety disciplinary policy may apply.[28] The language of the written policy, for example, discusses accident investigation and a range of disciplinary action that may be taken by management.[29] In practice, the company takes a coaching attitude to enforcement in teaching and building up its work force, while also fostering a culture of safety.[30]

CSHO Wilke misunderstood records utilized by Three Tree Roofing by confusing the forms used for voluntary random site inspections completed by management as with those used for required walk around safety inspections (WASI).[31] Three Tree Roofing developed a form for its employees to use at the start of every project, in English and Spanish, that incorporated

[28] CP at 352.
[29] *Id.*
[30] CP at 244-245, 279.
[31] CP at 190-195, 203, 265-267, 468-516.

the mandatory WASI, fall protection work plan (FPWP), and initial safety meeting.[32]

Despite the clear indication on the form that fall protection and personal protection equipment (PPE) were addressed at the start of every job, CSHO Wilke testified to the contrary.[33] She continued to confuse an early iteration of the form used to help guide management in their voluntary random site inspections with the mandatory form used by crews on each project.[34]

CSHO Wilke testified that she took note of crew leader Misael Sanchez's statement during her 5-10 minute discussion with him that he had not enforced safety rules previously.[35] Notably, the crew leaders, Misael and Denis Sanchez had only been employed by Three Tree Roofing since May and

[32] CP at 256-259, 437-467.
[33] CP at 157, 200-203.
[34] *Id.*
[35] CP at 154.

September 2018, respectively.[36] They were a "young" crew with less than a year of supervisory experience for this employer prior to the incident in question.[37]

When contacted September 10, 2019, by CSHO Wilke, Mr. Haugen was noted as saying he thought the crew at issue was "maybe a 'rogue' crew."[38] However, CSHO Wilke's notes and testimony reflect Mr. Haugen was at a loss why this crew would have disregarded the rules given extra steps taken to discipline and re-train them following a similar incident a few months before.[39] Mr. Haugen was also clear in his statements that there were no chronic safety issues or non-compliance among employees.[40]

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[36] CP at 387-388, 395-396.
[37] CP at 273.
[38] CP at 188, 332.
[39] CP at 332.
[40] *Id.*

2. Three Tree Roofing has a Robust Safety Program.

Three Tree Roofing has a comprehensive safety plan that includes several elements designed to effectively prioritize safety and eliminate all known workplace hazards to the extent possible:

- New-hire safety orientation with review of safety practices and protocols, PPE usage and availability, and injury response and reporting in English and Spanish;[41]
- A comprehensive accident prevention plan;[42]
- A safety disciplinary policy;[43]
- Enforcement of safety rules;[44]
- Site specific safety plan for each project to include a FPWP, WASI, and initial safety meeting in English and Spanish;[45]
- Permanent anchors sent to every jobsite ahead of work as applicable;[46]
- Mandatory PPE, including safety lanyard and harness, hardhat, and safety glasses;[47]

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[41] CP at 239, 243-244, 246, 381.
[42] CP at 240, 242, 346.
[43] CP at 245, 352.
[44] CP at 245, 269, 539.
[45] CP at 240, 256, 437.
[46] CP at 252.

- Open access to numerous safety supply vendors for safety equipment or PPE;[48]
- Random safety inspections by management;[49]
- Bi-weekly safety meetings;[50]
- Annual re-orientation of all employees on safety issues;[51]
- CPR and first-aid training;[52] and
- Open communication with employees about safety.[53]

In addition to these pillars of safety, Three Tree Roofing does not incentivize production over safety, rather, it deters such behavior because employees can lose a possible production bonus for violating safety rules.[54]

Between the short period of time the company launched in late 2017 and the inspection two years later, the company had

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[47] CP at 252.
[48] CP at 254-255.
[49] CP at 240, 266, 468.
[50] CP at 517.
[51] CP at 246.
[52] CP at 240, 250, 435.
[53] CP at 244, 254.
[54] CP at 289.

been the subject of two prior safety inspections.[55] The first in 2018, a different crew than the one at issue here, incurred fall protection violations working on a flat roof, which involved executing a new fall protection plan for work commencing on a different section of roof.[56] The second in early 2019 involved the same crew leaders at issue here, Misael and Denis Sanchez, but involved a limited instance of one employee unhooking fall protection briefly, but otherwise the entire crew was using required safety equipment.[57]

III. STANDARD OF REVIEW

Appeals under WISHA are based on review of the record before the Board and are not subject to the Administrative Procedures Act. RCW 49.17.150; RCW 34.05.030. The Court reviews the Board decision under a substantial evidence standard. *Frank Coluccio Const. Co. v. Dep't of Lab. & Indus.*, 181 Wn. App. 25, 38, 329 P.3d 91, 98 (2014). On appellate

[55] CP at 232,
[56] CP at 288, 301.
[57] CP at 288-289.

review, however, the Court retains ultimate responsibility for interpreting a regulation. *Children's Hosp. & Med. Ctr. v. Dep't of Health,* 95 Wn. App. 858, 864, 975 P.2d 567 (1999); *Campbell v. State, Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 894, 83 P.3d 999, 1007 (2004). On allegation the Board wrongly interpreted a statute, this Court will review under an error of law standard. *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Ind.,* 119 Wn. App. 906, 912-913, 83 P.3d 1012 (2003).

The Department's interpretation of a statute is not binding on the Court, despite any deference afforded. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 812, 16 P.3d 583 (2001). The Court may substitute its own judgment for that of the agency on issues of law. *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012). This Court will not review any issue not first raised at the Board. RCW 49.17.150(1); *Legacy Roofing, Inc. v. State, Dep't of Lab. & Indus.*, 129 Wn. App. 356, 361–62, 119 P.3d 366, 369 (2005); RAP 2.5(a).

IV. ARGUMENT

A. Three Tree Roofing Has Established All Elements of the Unpreventable Employee Misconduct Defense by Substantial Evidence

No citation may be issued by the Department where there is unpreventable employee misconduct that led to the violation. RCW 49.17.120(5)(a). This defense applies in situations where employees disobey safety rules despite the employer's diligent communication and enforcement. *Asplundh Tree Expert Co. v. Dep't of Lab. & Indus*., 145 Wn. App. 52, 62, 185 P.3d 646 (2008). The employer bears the burden of proving this affirmative defense by showing:

- A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- Adequate communication of these rules to employees;
- Steps to discover and correct violations of its safety rules; and
- Effective enforcement of its safety program as written in practice and not just in theory.

RCW 49.17.120(5)(a); Asplundh, 145 Wn. App. at 62; Potelco, Inc. v. Dep't of Labor & Indus., 194 Wn. App. 428, 435, 377 P.3d 251 (2016).

The Board found that Three Tree Roofing met the first three of these elements; taking issue only with the fourth concerning effective enforcement of its safety program.[58] The Board's findings as to the first three elements should not be disturbed because substantial evidence supports Three Tree Roofing had a thorough safety program, adequately communicated its safety program to employees, and took steps to discover and correct safety violations. These can be seen in the litany of safety precautions described herein, i.e. APP, safety equipment, access to safety vendors for employer purchase of safety equipment, extensive safety training, random site inspections, site-specific safety plans, walk around safety inspections, safety meetings, pre-ordered and shipped safety anchors to every applicable job, etc.

Review of this matter should be limited to whether Three Tree Roofing's safety program was effective in practice. The

[58] CP at 28, 29 (Finding of Fact No. 11).

Board's findings on that element are not supported by substantial evidence. The conclusions drawn about the effectiveness of the employer's safety program misinterpret the law and create a legal tautology. The findings used to show the employer's program was ineffective relied entirely on the actions of this crew, *despite* the conduct of the employer – which is the essence of the unpreventable employee misconduct defense.

To wit, the Board acknowledged and credited Three Tree Roofing's evidence that in addition to its safety program, it re-oriented the crew and increased the frequency of inspections of that crew, concluding it was "to let the crew know they were being watched."[59] The Board also acknowledged "even though [the crew] had been told they would be fired for a third offense, the employees worked on the steep pitched roof without fall protection."[60] Finally, the Board acknowledged how seriously the employer took safety within the company, but the

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[59] CP at 27.

[60] CP at 28, (*see also* Finding of Fact No. 11, CP at 29 "The three workers had been told of their first two violations and told that a third violation would result in termination, but that did not stop them from working without required fall protection.").

employees committed the violation "despite the company's intentions and efforts."[61]

Employees put on notice they are at risk of termination, who were given a complete safety re-orientation, and were supervised more closely but who committed a safety violation anyway is nothing if not unpreventable employee misconduct. Three Tree Roofing could not have known this crew was going to violate fall protection rules on September 10, 2019. The efforts taken to enforce its safety program with these employees made the events unforeseeable.

Three Tree Roofing had been in business two years at the time of the September 2019 inspection and in that time, had no workplace injuries of record and no chronic safety issues with any particular employee or crew. There were two prior inspections that led to safety citations, but put in context did not create foreseeability that these specific employees would violate the fall protection requirements. It had at a minimum four crews in 2019, each with about four crew members, completing approximately three jobs per week. Hundreds of

[61] CP at 28.

roofing jobs were completed before the September 2019 inspection, yet the company did not have evidence of injuries or disciplinary action that would put them on notice its safety program was ineffective.

To base ineffectiveness of its safety program on the alleged safety violation itself would render the unpreventable employee misconduct defense meaningless. The standard of review is clear that this Court must analyze the Board's decision for substantial evidence, but the Superior Court's approach to interpreting the statute is compelling. The lower court was correct in looking critically at RCW 49.17.120(5)(a), not just the one incident the Board based its decision on. The Board's approach to the final element and the Department's position here propose a legal tautology tantamount to a strict liability standard that if adopted, negates the unpreventable employee misconduct defense.

The plain language of the statute makes clear the fourth element requires a holistic look at an employer's entire safety *program*. A safety *program* implies *all* efforts taken, not just the consequences of a single event. It is illogical and would

lead to an absurd result if the safety violation here formed the sole basis for gauging effectiveness of Three Tree Roofing's entire safety program.

An effective safety program is one that goes beyond the theoretical by being actually enforced. B.D. Roofing, Inc. v. Dep't of Labor & Indus., 139 Wn. App. 98, 112-113, 161 P.3d 387 (2007) (emphasis added). Other indicia of an effective safety program are consistent disciplinary actions when employee violations occur and proactive steps to deter future violations. *Legacy Roofing*, 129 Wn. App. at 365. On the other hand, theoretical enforcement is shown where a company has a paper program, which includes a disciplinary policy, but hasn't actually ever followed it. *Id.* at 113 (finding the company's safety program ineffective in practice because it provided no evidence it had actually fired employees when they violated the safety rules.).

Unlike the leading cases on application of the unpreventable employee misconduct defense, Three Tree Roofing has far more than a paper program and took multiple steps to enforce safety. In *B.D. Roofing*, for example, the

company was not afforded the defense, but it had received eight prior citations in a three-year period for violating the same fall protection standard. 139 Wn. App. at 102. The company there was unable to show *any* enforcement of a safety program and its own safety representative testified that improvements in safety was minimal and that management was not supportive, refused to implement any of her suggestions, maintained certain documentation in the event of an appeal, and that crew members did not take direction from her at all. *Id.* at 103-104. The prior violations notwithstanding, the employer in *B.D. Roofing* failed to show it had anything more than a sham safety program.

Similarly, in *Legacy Roofing* involved a situation where a company's second fall protection violation in a several month time period was challenged on unpreventable employee misconduct grounds. 129 Wn. App. at 359-360. The company put on evidence of its safety program insofar as it had a written program, but could show no evidence this program was implemented. The company's safety officer testified that communication of the safety program didn't begin until after

the citation at issue. *Id.* at 364. Evidence presented about enforcement of its safety rules was either non-existent or showed inconsistent enforcement. *Id.* at 365-366. Taken together and with the prior violation, the company was denied the defense. *Id.* at 366.

Unlike *B.D. Roofing* and *Legacy Roofing*, Three Tree Roofing did put its safety program into practice well before the September 10, 2019, inspection. In those cases, evidence was put forth that they failed on multiple levels to protect employee safety before the violations occurred. Here, the Board agreed that Three Tree Roofing was able to meet each and every element of the defense except for the last, but only looked at the events that led to the violation and not the program as a whole – which was effective regarding virtually every other employee except those that deliberately chose to disobey. Substantial evidence supports entitlement to the unpreventable employee misconduct defense.

Evidence of prior similar violations is not a bar to use of the unpreventable employee is conduct defense. *Wash. Cedar,* 119 Wn. App. at 913. Foreseeability is a key factor

under these circumstances. *Id.* These involved fall protection such that the basis of a "repeat" violation was established, which is a different legal standard, but do not unequivocally show the acts were foreseeable.[62]

For an event to be foreseeable, the employer must have some degree of awareness, which speaks to state of mind. The context of the prior inspections did not render the events that occurred on September 20, 2019, foreseeable. Mr. Haugen testified the two prior instances involved work on a flat roof to which the issues were largely paperwork-driven and a brief deviation from a fall protection plan that was otherwise being followed.[63] Both of these situations involved the same type of hazard – fall protection – but they did not rise to the level of foreseeability because in the first instance the issue was ensuring proper planning and documentation in the FPWP on a flat roof, which typically involves tape, cones, and a safety

[62]A repeat violation is "[a] violation where the employer has been cited one or more times previously for a substantially similar hazard, and the prior violation has become a final order no more than three years prior to the employer committing the violation being cited." WAC 296-900-099.
[63] CP at 288.

monitor. Extra steps were taken and enforcement was increased after the fall protection issue concerning Misael and Denis Sanchez to ensure these employees were trained, retrained, coached, redirected, supervised, inspected, and otherwise put on notice that further safety violations would not be tolerated.

The Department has exploited Mr. Haugen's sentiments in the brief phone call from CSHO Wilke on September 10, 2019, by gratuitously repeating use of the term "rogue crew." Again, context matters. CSHO Wilke's notes and Mr. Haugen's testimony are consistent in that his choice of words reflect shock and dismay. He clearly testified and CSHO Wilke's contemporaneous notes clearly show he couldn't explain the conduct of his employees considering very recent efforts taken to train and supervise them.

The Department continues to advance a misunderstanding of the facts as evidence of an ineffective safety program. CSHO Wilke admitted to her misunderstanding or lack of knowledge on some facts at the Board hearing. She incorrectly believed Three Tree Roofing took no action to redirect the crew members involved in the

earlier inspection. She incorrectly believed Three Tree Roofing only disciplined its employees in response to a Department-initiated inspection. She incorrectly believed Three Tree Roofing was utilizing deficient forms for its mandatory walk around safety inspections by confusing the random site inspection guidance used briefly by management. The incorrect assertions by the Department do not satisfy the substantial evidence standard.

In finding that Three Tree Roofing's safety program was ineffective in practice, the Board relied on its own case law, which referenced administrative proceedings held under the Occupational Safety and Health Act ("OSHA").[64] In so doing, the Board was far too narrow in its application of the fourth element of the unpreventable employee misconduct defense because it looked exclusively at whether the employees committing the safety violation had an unblemished safety

[64] The Board relied on its own Significant Decision, *In re Erection Co.* (II), BIIA Dec., 88 W12 (1990), which cited to *Horne Plumbing & Heating Co. v. Occupational Safety & Health Rev. Comm'n*, 528 F.2d 564, 566 (5th Cir. 1976) and *Pennsylvania Power & Light Co. v. Occupational Safety & Health Rev. Comm'n*, 737 F.2d 350, 354–55 (3d Cir. 1984). CP at 27.

record.[65] An unblemished safety record is not substantial evidence as to whether or not an employer's safety program is effective in practice.

As stated in one of the federal cases relied on by the Board, *Horne Plumbing*, it is unreasonable, impractical, and an unnecessary burden to exercise constant supervision of experienced employees and their subsequent safety violations are unpreventable. 528 F.2d at 569. Federal guidance[66] also offers analogous examples where the unpreventable employee misconduct defense has been successfully applied, even where the same employees had committed safety violations in the past. *See. e.g. Compass Steel Erection, Inc.*, 17 BNA OSHC 1513 (OSHRC Oct. 10, 1995) (finding unpreventable employee misconduct applied where employee violated the same work rule on two occasions, but the employer took reasonable steps

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[65] CP at 27.

[66] Per RCW 49.17.050(2), the Department is required to adopt occupational safety and health standards that are at least as effective as its federal counterpart under OSHA., to which Washington Courts may look to decisions interpreting parallel federal OSHA regulations in considering cases brought under WISHA. *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 147, 750 P.2d 1257, 756 P.2d 142 (1988).

to discipline the employee and therefore could not have anticipated a second violation); *Texland Drilling Corp.,* 9 BNA OSHC 1023 (OSHRC Oct. 30, 1980) (finding unpreventable employee misconduct defense where evidence presented that employees were trained and experienced, clearly knew the work rule, and consistently followed it such that the employer wasn't required to take further steps to discovery noncompliance.).

Three Tree Roofing took steps to correct safety violations by the offending crew members. There is no evidence to show the employees here violated the fall protection rules beyond the instances for which they were disciplined and consequently terminated. The random site inspections by management show the crew was compliant otherwise they would have been disciplined prior to the September 2019 inspection. Termination of these employees before the inspection would have been an inconsistent application of its discipline policy and constant supervision is unreasonable and overly burdensome. Despite the Department's suggestions for action the employer could have taken, these have no application in

terms of the affirmative defense or substantial evidence standard.

Supervisory employees violating safety rules is potentially evidence of lax enforcement of safety rules, but the employer should not be held liable when it shows the "acts were contrary to a consistently enforced company policy, that the supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors." *Western Waterproofing Co. v. Marshall,* 576 F.2d 139 (8th Cir.), *cert. denied,* 439 U.S. 965, 144, 99 S.Ct. 452, 58 L.Ed.2d 423 (1978). There is no recent appellate case law in Washington on this point, but there is an illustrative Board decision that speaks directly to affording the unpreventable employee misconduct defense to an employer where the violator was a supervisor. *In re Tyson Fresh Meats,* BIIA Dec., 17 W1079 (2018).

In Tyson, a manager was seriously injured when he failed to properly follow lockout-tag out procedures before working on a meat processing machine. *Id.* at 2. The employer was a meat processing plant that had extensive procedures in place for

the servicing and maintenance of its equipment. *Id.* at 1. The injured manager was trained on proper lockout/tag out procedures and although there were some extenuating circumstances, he should have known not to place his fingers in a machine before checking whether it was de-energized. *Id.* at 2. As a result of his failure, he lost two fingers. *Id*.

The Board found the company had extensive safety procedures and implemented an effective safety program that included proper training to avoid injuries. *Id.* at 4. In addition, the company established it was not lax in its enforcement of safety rules, as evidenced by disciplining its employees for violating safety rules and subjecting the injured manager to the same disciplinary consequences after the violation on appeal, leading to successful application of the unpreventable employee misconduct defense. *Id.* at 5.

Here, the employer took steps beyond mere discipline of known safety violations, it was actively engaged in random site inspections to discover violations in its effort to create a culture of safety. It trained its employees well, sought to hire experienced and competent tradesmen, gave them the

equipment, tools, and structure to work safely, paid highly competitive wages, routinely supervised crews in the field, and consistently disciplined violations of safety rules to enforce its program in practice, not just theory. Like *Tyson Fresh Meats*, the employer implemented its safety program and had a well-documented history of disciplining employees who violated safety rules. Also like *Tyson*, the employer was taking these steps well before the inspection at issue rather than in response to it. This weighs heavily in favor of an employer with an effective safety program not just in theory, but in practice.

B. The Department is not Entitled to Review of Arguments Not Raised Prior to This Appeal

At the outset, it should be noted that the Department raises for the first time in this appeal an argument concerning disciplinary enforcement that should be disregarded per RCW 49.17.150(1) and RAP 2.5(a). The law is clear in cases involving WISHA that "[n]o objection that has not been urged before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." RCW 49.17.150(1).

This Court "may refuse to hear any claim of error that was not raised in the trial court." RAP 2.5(a). Only certain errors, none of which apply here, may be raised for the first time on appeal. RAP 2.5(a)(1)-(3).

The Department argues for the first time that Three Tree Roofing failed to consistently follow its own disciplinary policy as so-called evidence that its safety program was ineffective in practice.[67] This novel argument was crafted by comparing an excerpt of the company's written disciplinary policy against the owner's testimony about the policy regarding how verbal warnings are documented.[68] The argument should not be considered since it was never raised at any time prior to the present appeal.[69]

The Department has not asserted any grounds to entertain its new argument based on extraordinary circumstances. The procedural posture is such that the employer submitted a

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[67] CP at 40.
[68] CP at 41.
[69] There is no evidence in the Clerks Papers and the Department did not advance this argument at the April 29, 2022, hearing even when Respondent's counsel specifically argued the employer consistently enforced its disciplinary policy. *See e.g.* VRP at 5, 7.

Petition for Review ("PFR") to the Board, which was denied, the significance being that the Department didn't have any obligation to respond to the PFR. Looking at the record as a whole, including the verbatim report of proceedings at Superior Court, there is no mention of this argument. Even if this Court takes notice of the argument, it must fail on its merits.

C. Three Tree Roofing Took Adequate Steps to Discovery and Correct Safety Violations

The Board's initial findings as to the unpreventable employee misconduct defense included satisfaction of the third element concerning discipline.[70] Using the substantial evidence standard, the Board's findings as to the company's efforts to discovery safety violations is supported. Three Tree Roofing was taking steps above and beyond legal requirements to ensure its employees were working safely and redirecting noncompliant behavior. Firstly, it has a safety-specific disciplinary policy. Second, it routinely undertook random site

[70] CP at 27 ("Three Tree Company has shown it takes steps to discover violations.").

inspections for the purpose of identifying safety issues. Finally, it enforced its policy and commitment to employee safety by actually disciplining employees.

Three Tree Roofing uses a three-strikes, progressive safety discipline policy. Mr. Haugen testified the company culture as one of positive enforcement and coaching as opposed to punitive action. The written policy reflects this explanation, but also explains application from a safety perspective. The policy also speaks to management's discretion when it comes to a range of disciplinary action taken.

The Department's attempt to "catch" the employer in some sort of recordkeeping violation is baseless because any variations in noting a verbal warning has no substantive impact on how its disciplinary policy was actually enforced among its employees. Verbal warnings were not always noted in the employee's file, but the disciplinary policy was consistently enforced nonetheless. The records corroborate Mr. Haugen's testimony that verbal warnings were given and documented in

egregious situations, second offenses were written up, and third offense led to termination. This is consistent in practice and whether an employee knew a first verbal warning was documented or not does not change the nature of the discipline itself.

The Department also attempts to misconstrue the level of random safety inspections performed by management as support for its position, which again defies the substantial evidence standard. Whether an employer is taking a voluntary action to randomly inspect its own employees for safety compliance speaks to the third element of the unpreventable employee misconduct defense – taking steps to discover violations. The Board found that Three Tree Roofing had satisfied this element, which is supported by substantial evidence. Since this element has been satisfied, it logically cannot serve to support dereliction of the fourth element concerning overall effectiveness of the safety program in practice.

Three Tree Roofing was taking affirmative steps to discover and correct safety violations among its employees and took extra steps with the crew at issue, making the frequency of inspections was adequate and arguably exemplary.[71] This evidence does not support the Department, rather, it supports the employer insofar as it shows efforts toward enforcing safety as opposed to a theoretical, paper program.

V. CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the order on appeal and find Three Tree Roofing has established by substantial evidence the affirmative defense of unpreventable employee misconduct as to Violation Item 1-1.

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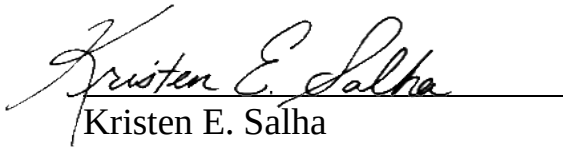
[71] As was argued below, the frequency of inspection as compared to the volume of work suggests, the rate of safety violations among Three Tree Roofing's employees was approximately .01 percent. CP at 584.

Dated this 28th day of October, 2022.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2022, a true and correct copy of the foregoing Brief of Respondent was served to the following in the manner prescribed below:

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